UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

HENRY SCHMIDT,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Docket No. 00-153-P-C***
	)	
WARDEN, MAINE STATE PRISON,	***)***	
	)	
Respondent	***)***	

RECOMMENDED DECISION ON PETITON FOR WRIT OF HABEAS CORPUS

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his plea of guilty in the Maine Superior Court (Sagadahoc County) to charges of burglary, theft and arson, in violation of 17-A M.R.S.A. §§ 401, 353 and 802. I recommend that the court deny the petition without a hearing.

I. Background

On January 4, 1996 a grand jury in Sagadahoc County indicted the defendant on two counts of burglary, in violation of 17-A M.R.S.A. § 401; one count of theft, in violation of 17-A M.R.S.A. § 353, and one count of arson, in violation of 17-A M.R.S.A. § 802. Indictment, *State of Maine v. Henry Schmidt*, Maine Superior Court (Sagadahoc County), Docket No. CR-96-010. On October 28, 1996 the defendant, represented by retained counsel, tendered an *Alford* plea to all four counts. Transcript of Proceedings, Rule 11, *State of Maine v. Henry Schmidt*, Maine Superior Court (Sagadahoc County) ("Plea Tr."), Docket No. CR-96-010, at 4-7. A defendant who tenders an *Alford* plea, named after the case of *North Carolina v. Alford*, 400 U.S. 25 (1970), admits that the state's

evidence against him is sufficient to obtain a conviction although he does not admit that he is in fact guilty of the charge. The plea was tendered pursuant to an agreement capping the possible sentence on the arson charge at 20 years, all but 14 suspended, with concurrent terms on the other charges, to be followed by a 6-year term of probation, with the defendant free to argue for a lesser term. Docket Sheet, *State of Maine v. Henry Schmidt*, Maine Superior Court (Sagadahoc County), Docket No. CR-96-010 ("State Docket Sheet"), at 5; Plea Tr. at 31-32. At the request of the parties, the court ordered a presentence investigation. Plea Tr. at 31-32.

On March 13, 1997 newly retained counsel entered his appearance for the defendant. State Docket Sheet at 3. On March 17, 1997 this lawyer filed a motion to withdraw the plea. *Id*. at 4. The motion contended that the defendant had tendered the plea "without full knowledge of the facts" and while taking a prescribed medication that that affected "his ability to rationally comprehend the nature of the proceedings" during which his plea was accepted. Motion to Withdraw *Alford* Plea, *State of Maine v. Henry Schmidt*, Maine Superior Court (Sagadahoc County), Docket No. CR-96-010, at 1. A hearing was held on this motion on November 4, 1997, at which the defendant testified, *inter alia*, that his previous attorney had told him repeatedly on the day of the plea hearing that the defendant faced a potential prison term of 65 years and that he was taking the drug Elavil for anxiety at the time. Transcript, Motion to Withdraw Plea, *State of Maine v. Henry Schmidt*, Maine Superior Court (Sagadahoc County), Docket No. CR-96-010 ("Withdrawal Tr."), at 7, 8-9, 14. The court denied the motion. *Id*. at 102-07. The defendant was sentenced on January 30, 1998 to 20 years of incarceration, all but 14 years suspended, followed by 6 years of probation on the arson charge; concurrent 10 year terms on each of the burglary charges; and a concurrent 5 year term on the theft charge. Transcript of Proceedings, Sentencing, *State of Maine v. Henry Schmidt*, Maine Superior Court (Sagadahoc County), Docket No. CR-96-010, at 26-27.

On January 30, 1998 the defendant filed an application for leave to appeal the sentence imposed. Docket Sheet at 5. Leave to appeal was denied by the Sentence Review Panel of the Maine Supreme Judicial Court on April 23, 1998. Order, *State of Maine v. Henry Schmidt*, Maine Supreme Judicial Court, Docket No. SRP-98-14. The defendant also filed a direct appeal to the Maine Law Court attacking the denial of his motion to withdraw his plea. Docket Sheet at 5; Brief of the Defendant-Appellant Henry P. Schmidt, *State of Maine v. Henry P. Schmidt*, Maine Supreme Judicial Court sitting as the Law Court, Docket No. Sag-98-79, at 5. The Law Court affirmed the judgment in a memorandum of decision dated October 2, 1998. Memorandum of Decision, *State of Maine v. Henry P. Schmidt*, Maine Supreme Judicial Court, Docket No. Sag-98-79, Decision No. Mem 98-127.

The defendant, acting *pro se*, filed a petition for state post-conviction review on November 3, 1998. Docket Record, *State of Maine v. Henry P. Schmidt*, Maine Superior Court (Sagadahoc County), Docket No. BATSC-CR-1998-266, at 1; Petition for Post-Conviction Review, *Henry P. Schmidt v. State of Maine*, Maine Superior Court, Docket No. CR-96-010 ("State Petition"). The petition asserted the following grounds: (i) ineffective assistance of counsel, in that the defendant's first attorney told him that he would be sentenced to 65 years if he did not plead guilty and this attorney "did not know the sentencing laws . . . for the crimes I was charged with;" (ii) the defendant "was not of sound mind" when he tendered his plea due to the medication he was taking at the time, and it was only after he stopped taking the medication that he realized that "everything . . . used by the asst. D.A. at my (Rule –11) was all untrue;" (iii) the trial judge admitted at the hearing on the defendant's motion to withdraw his plea that he had "spoke[n] in error" at the plea hearing with respect to the maximum possible sentence; (iv) the defendant's first attorney breached the attorney-client privilege by providing the state with a letter the defendant wrote to him that was admitted into evidence at the plea-withdrawal hearing; and (v) no burglaries could have taken place because the

defendant's co-defendant had been given permission to enter the property at issue. State Petition at 3-5. Counsel other than the attorney who had represented the defendant in connection with the motion to withdraw the plea was appointed to represent the defendant at his request. Motion for Appointment of Counsel, *State of Maine v. Henry Schmidt*, Maine Superior Court (Sagadahoc County), Docket No. CR-98-266; Docket Record at 1. A hearing was held on October 5 and 8, 1999. Transcript, Post Conviction Review, *State of Maine v. Henry P. Schmidt*, Maine Superior Court (Sagadahoc County), Docket No. CR-98-266. In a memorandum of law filed after the hearing, counsel for the defendant expressly abandoned the claims that the defendant's first attorney breached the attorney-client privilege and that the co-defendant had permission to be on the property. Memorandum of Law in Support of Post Conviction Review, *Henry Schmidt v. State of Maine*, Maine Superior Court (Sagadahoc County), Docket No. CR-98-266, at 2. The petition was denied on December 30, 1999. Order on Petition for Post-Conviction Review, *Henry P. Schmidt v. State of Maine*, Maine Superior Court (Sagadahoc County), Docket No. CR-98-266, at 4.

The defendant filed a notice of appeal from this judgment. Docket Record at 3. The Law Court declined to issue a certificate of probable cause to proceed with the appeal. Order Denying Certificate of Probable Cause, *Henry Schmidt v. State of Maine*, Maine Supreme Judicial Court sitting as the Law Court, Docket No, Sag-00-47 (dated March 28, 2000).

The defendant, again represented by the attorney who had represented him in connection with the motion to withdraw his plea, filed the petition initiating the current proceeding on May 22, 2000. Docket.

II. Analysis

The defendant presents three grounds for relief in the current action: (i) ineffective assistance of counsel in three specific instances: inducing the defendant to plead guilty by exaggerating the potential sentence upon conviction, giving the prosecution a letter written by the defendant in violation of the attorney-client privilege, and failing to object "or correct" the sentence imposed as a violation of the plea agreement; (ii) ineffective assistance of counsel in three other specific instances: "cocnsistently [sic] hector[ing] petitioner into making a guilty plea," not addressing inaccuracies in the pre-sentence report, and not permitting the defendant's father "and other witnesses to" [presumably "testify"]; and "involuntary plea" in that counsel's alleged ineffectiveness combined with the defendant's ingestion of Elavil "put petitioner in a state o [sic] where he could not think clearly;" and (iii) "failure of pro[o]f of burglary," in that the "alleged co-conspirator" had permission to be on the premises involved in the alleged burglary and the defendant "shared the permission to be on the premises." Petition Under 28 USC § 2254 For Writ of Habeas Corpus by a Person in State Custody (Docket No. 1) at 4-5.

As an initial matter, the state points out that the majority of the claims presented in the petition have not been exhausted. Response to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, etc. ("State's Response") (Docket No. 3) at 14-18. The statute governing the relief sought by the defendant provides, in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
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> **(A)** the applicant has exhausted the remedies available in the courts of the State; or
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> **(B)(i)** there is an absence of available State corrective process; or
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> **(ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Here, there is no suggestion in the record that the state has not made corrective process available to this defendant or that the available process is ineffective to protect his rights.

> In recognition of the state courts' important role in protecting constitutional rights, the exhaustion principle holds, in general, that a federal court will not entertain an application for habeas relief unless the petitioner first has fully exhausted his state remedies in respect to each and every claim contained within the application.

Adelson v. DiPaola, 131 F.3d 259, 261 (1st Cir. 1997). "[A] habeas petitioner bears a heavy burden to show that he fairly and recognizably presented to the state courts the factual and legal bases of [his] federal claim[s]." *Id*. at 262.

In this case, it is clear that the defendant did not present the following claims to the state court in his post-conviction review proceeding: (i) his first attorney violated the attorney-client privilege when he gave the prosecutor a letter written by the defendant to that attorney; (ii) his first attorney failed to object to or "correct" the sentence imposed on the ground that it deviated from the terms of the plea bargain; (iii) his first attorney did not address inaccuracies in the presentence report; (iv) his first attorney did not allow certain witnesses to testify; and (v) the state could not prove the defendant guilty of burglary because his co-defendant had permission to be on the property at issue. Accordingly, those claims have not been exhausted and may not be addressed by this court.

Ordinarily, the presence of both unexhausted and exhausted claims in a petition for relief under section 2254 requires the federal court to dismiss the entire petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). However, the state in this case does not seek dismissal on this basis.[1] Instead, it points out that, by operation of 15 M.R.S.A. § 2128(3),[2] the defendant may not bring these unexhausted claims in

[1] *See Verner v. Reno*, 166 F.3d 250 (table), 1998 WL 792059 (10th Cir. Nov. 3, 1998), at **2 (government's failure to raise rule requiring dismissal of mixed petitions means that court will address merits of exhausted claims).

[2] The cited portion of the statute provides: "All grounds for relief from a criminal judgment or from a post-sentencing proceeding shall (continued…)

state court. State's Response at 16. This fact leads the state to invoke the doctrine of procedural default. *Id*. A procedural default in state court acts as an adequate and independent state ground and immunizes a state court decision based on that default from habeas review in federal court. *Carsetti v. State of Maine*, 932 F.2d 1007, 1009 (1st Cir. 1991). While there is no state court decision on the defaulted claims in this case, the outcome of any attempt by the defendant to raise them at this time is clear; the state courts would hold that those claims are procedurally barred. That is sufficient to allow application of the doctrine. *Id*. at 1010-11. The defendant has made no attempt to demonstrate both the cause for the procedural fault and the prejudice to his case that is required to avoid application of the procedural-default doctrine, *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), and accordingly this court will not consider the unexhausted claims for this reason as well. *See generally Burks v. Dubois*, 55 F.3d 712, 716-17 (1st Cir. 1995).

Both the exhausted and unexhausted claims in the defendant's petition that allege constitutionally deficient assistance of counsel suffer from another fatal deficiency. Such claims are evaluated under the standards established by *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that his counsel's performance was deficient, i.e., that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Second, the defendant must make a showing of prejudice, i.e., "that

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be raised in a single post-conviction review action and any grounds not so raised are waived unless the State or Federal Constitution otherwise require or unless the court determines that the ground could not reasonably have been raised in an earlier action."

counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The court need not consider the two elements in any particular order; failure to establish either element means that he defendant is not entitled to relief. *Id.* Nowhere in the petition does the defendant allege that, were it not for the deficiencies alleged, he would not have tendered the *Alford* plea. As a result, he has failed to show that he was prejudiced within the meaning of the *Strickland* standard by any of the alleged errors of counsel. *Knight v. United States*, 37 F.3d 769, 774-75 (1st Cir. 1994). All of the defendant's claims based on ineffective assistance of counsel must therefore be dismissed.

The only claim raised in the defendant's petition that might be considered to have been exhausted and not to be affected by his failure to allege prejudice under *Strickland* is the claim presented as Ground Two of the petition, to the extent that this claim can be construed as an assertion that the defendant's plea was involuntary due to his ingestion of Elavil. The provisions of the habeas statute relevant to this issue provide:

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
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> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> **(e)(1)** In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254. Here, the state court that first addressed this claim noted that the defendant had presented no evidence concerning how the Elavil could have impaired his perception, stated at the

plea hearing that he was not under the influence of any drugs, and appeared to the court at the plea hearing to respond appropriately throughout the proceeding. Withdrawal Tr. at 104. The state court denied relief on this basis. *Id*. at 107. The second state court to address this claim held that the defendant was collaterally estopped from raising this issue again when it had been decided against him in the context of his motion to withdraw his plea. Order on Petition for Post-Conviction Review at 4.

This result was not contrary to clearly established federal law, which is found for purposes of this claim in *Godinez v. Moran*, 509 U.S. 389 (1993), nor does it represent an unreasonable application of that law. In that case, the Supreme Court held that the standard for competence to plead guilty "is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *Id*. at 396 (internal quotation marks and citation omitted), 399. The factual findings of the state court are not unreasonable in light of the evidence presented at the hearing on the motion to withdraw the plea. The second state court justice's invocation of collateral estoppel with respect to this claim was not unreasonable. The defendant makes little or no attempt to rebut the factual findings of the withdrawal-hearing justice and certainly has not done so by clear and convincing evidence.

Accordingly, if the merits of the defendant's claim concerning the alleged effect of Elavil on his ability to tender a plea are reached, he is not entitled to relief under section 2254.

III. Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be **DISMISSED** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 1st day of September, 2000.

_____
David M. Cohen
United States Magistrate Judge

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